Supreme Court, U.S.
FILED
SEP 15 1993
OFFICE OF THE CLERK

No. 92-2052

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, et al.,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

REPLY BRIEF IN SUPPORT OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Marvin S. Cohen, Esq.*
Leslie A. McCarthy, Esq.
SACKS, TIERNEY & KASEN
2929 N. Central, 14th Floor
Phoenix, Arizona 85012-2742
Telephone: (602) 279-4900

Counsel of Record *

Douglas K. Miller, Esq.
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
23636 North 7th Street
Phoenix, Arizona 85024
Telephone: (602) 870-2333

Attorneys for Petitioner
Central Arizona Water
Conservation District

Robert S. Lynch, Esq.
2001 North Third Street, Suite 204
Phoenix, Arizona 85004-1472
Telephone: (602) 254-5908

Attorney for Petitioners Central Arizona Irrigation and Drainage District and Maricopa-Stanfield Irrigation & Drainage District

William D. Baker, Esq.
ELLIS, BAKER, CLARK & PORTER, P.C.
4444 North 32nd Street, Suite 200
Phoenix, Arizona 85018
Telephone: (602) 956-8878

Attorneys for Petitioner New Magma Irrigation & Drainage District

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE EPA FAILED TO PROMULGATE PHASE II VISIBILITY RULES PRIOR TO USING COMPLEX ANALYTICAL TECHNIQUES TO ATTRIBUTE VISIBILITY IMPAIRMENT TO NAVAJO. 2

II. PHASE I REGULATION IS LIMITED TO VISIBILITY IMPAIRMENT ATTRIBUTABLE TO A SOURCE BY VISUAL OBSERVATION OR SIMPLE MONITORING TECHNIQUES. 5

III. CONCLUSION. 8

TABLE OF AUTHORITIES

CASES **Page**

Carlyle Compressor v. Occupational Safety, Etc., 683 F.2d 673 (2d Cir. 1982) 4

Maine v. Thomas, 874 F.2d 883 (1st Cir. 1989) 8

PPG Industries v. Harrison, 660 F.2d 628 (5th Cir. 1981) . . . 4

Vermont v. Thomas, 850 F.2d 99 (2d Cir. 1988) 8

RULES

Rule 15.6, Rules of the Supreme Court of the United States . . . 1

Rule 29.1, Rules of the Supreme Court of the United States . . . 1

STATUTES

42 U.S.C. § 7491 (Clean Air Act, § 169A) 2, 8

REGULATIONS

40 C.F.R. § 51.301 . . . . . 3, 4

40 C.F.R. § 52.26 . . . . . 3, 4

45 Fed. Reg. 34762 (May 22, 1980) 2, 8

45 Fed. Reg. 80084 (December 2, 1980) 2, 3

54 Fed. Reg. 36948 (September 5, 1989) 7

56 Fed. Reg. 5173 (February 8 1991) 4

56 Fed. Reg. 50172 (October 3, 1991) 3, 7

MISCELLANEOUS

BART Guidelines, Docket A-89-02, II-A-1 . . . . . 5, 6

No. 92-2052

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, et al.,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

REPLY BRIEF IN SUPPORT OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Rule 15.6, Rules of the Supreme Court of the United States, Central Arizona Water Conservation District ("CAWCD"), Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation and Drainage District and New Magma Irrigation and Drainage District (collectively, "Petitioner")[1] respectfully submits its reply in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Petitioner. This reply responds to the brief filed by the Environmental Protection Agency ("EPA") opposing the Petition for Writ of Certiorari.

Petitioner respectfully requests that this Court issue a writ of certiorari to the Ninth Circuit in order to prevent the EPA's continued circumvention of its own regulations governing visibility protection in the United States.

[1] Pursuant to Rule 29.1 Supreme Court Rules, each Petitioner asserts that it has no parent companies or subsidiaries.

I. THE EPA FAILED TO PROMULGATE PHASE II VISIBILITY RULES PRIOR TO USING COMPLEX ANALYTICAL TECHNIQUES TO ATTRIBUTE VISIBILITY IMPAIRMENT TO NAVAJO.

The statutory scheme governing pollution control measures in national parks is set forth in § 169A of the Clean Air Act, 42 U.S.C. § 7491. It can only be implemented through regulations promulgated by the EPA. The implementing regulations are currently limited to visibility impairment attributable to a single source or small group of sources. 45 Fed. Reg. 80084 (December 2, 1980) (Appendix, p. 75).

Under the regulations, a Federal Land Manager ("FLM") must issue a certification to a state when visibility impairment exists in a national park within its boundaries. The FLM also attempts to identify the probable source of the impairment. The state then has the obligation to determine whether the impairment is "reasonably attributable" to that source before it can impose pollution control requirements.

Because of scientific and technical limitations existing when the Phase I regulations were adopted in 1980, the means used to determine the origin of impairment, i.e. "reasonable attribution," were restricted to methods such as visual observation and other simple monitoring techniques. 45 Fed. Reg. 80084 at 80085 (Appendix, pp. 80-81). In fact, the EPA explained that the key distinction between Phase I and later phases was "by what means a source can be identified."[2] 45 Fed. Reg. 34762 at 34779 (May 22, 1980) (Appendix, p. 16).

In its opposing brief ("Opposition Brief"), the EPA acknowledges that it relied on "several qualitative and quantitative scientific analyses of extensive monitored data," which consisted of "relatively complex methodologies," to attribute visibility impairment at the Grand Canyon during the winter months to the Navajo Generating Station ("Navajo" or "NGS"). (Opposition Brief, p. 8, p. 11). Those methodologies engendered substantial

---

[2] While this definitional explanation was contained in a May 1980 notice of proposed rulemaking, it was carried forward in the December 1980 adoption of the regulations. 45 Fed. Reg. 80084 at 80085 (Appendix, pp. 81,82).

scientific controversy, because they had never previously been used to attribute secondary aerosols such as sulfates (SO_4) to sources of sulfur dioxide (SO_2). (Petition for Writ of Certiorari, hereinafter "Petition," pp. 8-9).

The EPA asserts that 40 C.F.R. § 51.301(s) condones its use of admittedly novel and complex modeling techniques because the definition of "reasonably attributable" in those regulations contemplates source attributions based on visual observation "or any other technique the State deems appropriate." (Emphasis added). However, the final rulemaking which promulgated those regulations specifically recognized that Phase I attribution methods were restricted to "visual observation or simple monitoring techniques" due to technical and scientific limitations. 45 Fed. Reg. 80084 at 80085 (Appendix, pp. 81-82). The reference in 40 C.F.R. § 51.301(s) to "any other technique the state deems appropriate" cannot be interpreted to include unproven modeling techniques. The EPA's interpretation destroys the distinction between Phase I and later phases. The EPA has distorted a "definition" into a determination that a Phase II rulemaking is no longer necessary.

Until it regulated Navajo, the EPA acknowledged that Phase II rulemaking would not occur until the reliability of complex attribution techniques had been validated. In the preamble to the Final Rule promulgating the state visibility regulations, EPA stated "that the present mathematical models and monitoring techniques show promise for being used in a regulatory manner. However, these techniques must be further evaluated according to standard Agency procedures before we can routinely require their use in a regulatory program for sources, either new or existing, that may impair visibility." 45 Fed. Reg. 80084 at 80085 (Appendix, pp. 81-82).

In any event, the EPA's reliance on 40 C.F.R. § 51.301 is misplaced. The visibility regulations at 40 C.F.R. § 52.26 apply to this case. Contrary to the EPA's claim, Petitioner raised the applicability of 40 C.F.R. § 52.26 in its Reply Brief to the Ninth Circuit at Footnote 6, page 9. 40 C.F.R. § 52.26(a) specifically states that "[t]he provisions of this section are applicable to any State implementation plan which has been disapproved with respect to visibility monitoring." Here, Arizona defaulted on its obligations under the visibility regulations. See, 56 Fed. Reg. 50172 at 50173 (October 3, 1991) (Appendix, p. 7). 40 C.F.R. § 52.26 thus

became the operative regulation. Section 52.26(c)(3) states that the following methods must be used by EPA when determining reasonably attributable impairment: (i) photographic cameras, (ii) fine particulate matter samplers, (iii) teleradiometers, (iv) nephelometers, (v) human observation, or (vi) other appropriate technology. This enumeration of visually oriented techniques is consistent with the EPA's recognition that more sophisticated methodology could not be used because of technical and scientific limitations.

Inexplicably, the EPA argues that 40 C.F.R. § 52.26 does not apply, despite the fact that 40 C.F.R. § 52.26 specifically delineates EPA's responsibilities when a state has defaulted in its duties under 40 C.F.R. § 51.301. The EPA's argument would render 40 C.F.R. § 52.26 meaningless. Furthermore, EPA's argument is contrary to its practices. Until this case, the techniques listed in 40 C.F.R. § 52.26 were the only techniques the EPA had relied on in analyzing certifications of visibility impairment in Class I areas. (See, Petition, pp. 6-7).

The EPA argues that the Court must accord "great deference" to the EPA's interpretation that its actions are governed by 40 C.F.R. § 51.301(s) rather than by 40 C.F.R. § 52.26(c).[3] The EPA's interpretation flies in the face of the plain language of 40 C.F.R. § 52.26. An agency's interpretation of its own regulations is not entitled to deference when the application and interpretation of those regulations has been inconsistent over time. *PPG Industries v. Harrison*, 660 F.2d 628 (5th Cir. 1981). Additionally, an agency does not have carte blanche to interpret regulations or standards to achieve a desired result. *Carlyle Compressor v. Occupational Safety, Etc.*, 683 F.2d 673 (2d Cir. 1982). Here, the EPA admits that the regulation of Navajo "represents the only instance to date in which EPA has required emission reductions at an existing source to remedy attributable impairment." (Opposition Brief, p. 11). Coincidentally, it also represents the only instance in which the EPA has used unproven

---

[3] The EPA also claims that it is appropriate and reasonable to interpret the references to the rights and duties of a "State" to include the "Administrator" and that it requested public comments on its interpretive view. The EPA fails to disclose that this interpretation was specifically challenged by SRP and others during the rulemaking proceedings. 56 Fed. Reg. 5173 at 5185 (February 8, 1991).

and complex attribution techniques in making an attribution determination, rather than the visual observation and simple monitoring methods prescribed by its Phase I regulations. Section 52.26 also indicates that Section 51.301(s) does not have the broad reading argued for if applied to the EPA. Legitimate reasons exist for according more discretion to the states than to the EPA in making attribution determinations. Primary among these are a state's sovereignty over its own affairs and its familiarity with local conditions. No similar reason exists to grant the EPA more discretion than that delegated to it under its own regulations. The critical issue here is whether the EPA must abide by standards of its own choosing and thus engage in Phase II rulemaking prior to relying on the types of complex techniques it used in regulating Navajo.

The EPA's Final Rule requires the expenditure of some $430 million to construct additional pollution control equipment. It will add approximately $30 million a year to the annual costs of operating and maintaining Navajo. The EPA estimates that the annualized cost of installing and operating the additional controls is $89.5 million. That yields a present value cost of nearly $1 billion. Petitioner will bear a significant portion of this cost. The EPA based its Final Rule on the very methodologies that the National Academy of Science ("NAS") said were unsuitable and unproven for such purpose. Now that it has the result it wants, the EPA seeks to ignore its own regulations and the logic of its phased approach to visibility regulation. It has declined to engage in the rulemaking it once acknowledged was essential before such methodologies were used to make attribution decisions.

II. PHASE I REGULATION IS LIMITED TO VISIBILITY IMPAIRMENT ATTRIBUTABLE TO A SOURCE BY VISUAL OBSERVATION OR SIMPLE MONITORING TECHNIQUES.

The EPA claims that it is necessary only that impairment "be physically traced to a source," and that this requirement was met here, citing to the BART Guidelines, Docket A-89-02, II-A-1, p. 6. The EPA citation is taken out of context. A more candid review of EPA's BART Guidelines reveals that the Phase I program is intended to address sources of impairment that are visually attributable to a power plant. The BART Guidelines recognize, for example, that:

> . . . a major power plant may have a coherent plume caused by primary particulate emissions which must be analyzed under Phase I, and also contribute to regional haze through emissions of sulfur dioxide [SO_2] which will be addressed in later phases. Under Phase I, the source would be analyzed for BART with respect to TSP [total suspended particulates] because it causes visibility impairment in the form of a distinct plume.

Docket A-89-02, II-A-I, p. 4. (Emphasis added). EPA's BART Guidelines also explain that "the state is not required to impose SO_2 controls in this situation," *i.e.*, where visibility impairment arises from the conversion of SO_2 to SO_4 (sulfates), recognizing that "sulfur dioxide does not directly affect visibility." *Id.* at p. 14. SO_2 is an invisible gas -- it is simply not capable of being detected by simple monitoring techniques. Only the conversion of SO_2 to a particulate or aerosol, SO_4 (sulfate), can affect visibility. This conversion requires that the SO_2 travel for long distances over a period of time and react to meteorological conditions, especially humidity. Docket A-89-01A, IV-F-I, pp. 21-22; Docket A-89-02A, II-D-29, pp. 6-16, 6-19; Docket A-89-02A, II-D-36, p. 35; Docket A-89-02A, II-D-4, pp. 2-4 to 2-7. EPA's BART Guidelines specifically recognize that ". . . sulfate aerosols [are] most often associated with regional haze, which will be dealt with under Phase II." Docket A-89-02A, II-A-1, p. 14.

The EPA asserts that its decision to regulate Navajo should not be challenged because in addition to "relatively complex methodologies," it used photographic data in reaching its attribution decision, (Opposition Brief, p. 11). The EPA's assertion is false. The Department of the Interior used the photographic data in connection with its certification to the State of Arizona that visibility impairment existed in the Grand Canyon. Docket A-89-02, II-D-8, p. 2. The photographic data merely revealed that there was visibility impairment in the Grand Canyon. The photographic data did not indicate that such visibility impairment could be attributed to any particular source. Rather, the Department of the Interior identified Navajo as a potential source exclusively because of its proximity to the Grand Canyon, not because the photographs revealed any such connection.

Contrary to the EPA's assertion, the rulemaking proceedings document that the decision to attribute impairment to Navajo was not based on any photographic evidence or visual observation of a traceable plume. It was based on the use of unproven modeling techniques:

> The proposal to find impairment in the Grand Canyon National Park attributable to NGS was not based on any single analysis, but rather on the collection of analyses performed by the NPS [National Park Service] on the WHITEX data. Of particular import to this proposal, however, was the tracer mass balance regression analysis which documented the presence of the NGS plume (and sulfur emissions from NGS) in the Grand Canyon.

54 Fed. Reg. 36948 at 36949 (September 5, 1989).

Tracer mass balance regression analysis is a complex technique. Its use in the Navajo attribution determination was strongly criticized by the National Academy of Sciences. NAS stated that the scientific literature "does not contain convincing evidence" that multiple linear regression analyses can be used successfully to apportion secondary species such as SO_4. Docket A-89-02A, II-D-36, p. 18. The Final Rule added:

> The EPA noted both in the September 1989 and the February 1991 notices that the finding [that several episodes of wintertime impairment in the Grand Canyon were attributable to Navajo] was not based on any single analytical technique in the NPS report on WHITEX, but rather on the collection of techniques performed by the NPS using WHITEX and other data.

56 Fed. Reg. 50172 at 50175 (Appendix, p. 12). This "collection of techniques" consisted of the methodologies that the NAS said were unsupported by the scientific literature for the purposes used. The record is clear that the EPA relied entirely on these unproven modeling and mathematical techniques in making its attribution decision.

The EPA also claims that two cases cited by Petitioner are irrelevant. The EPA's attempt to minimize the import of the

positions it adopted in *Vermont v. Thomas*, 850 F.2d 99 (2d Cir. 1988), and *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989), is unjustifiable. Those cases establish that the EPA has urged other courts to accept its position that its 1980 regulations intended to limit the Phase I regulation of visibility impairment to plume blight. The cases demonstrate that the position taken by EPA in this case is contrary to its existing rules and past practices, and that the Ninth Circuit's decision creates a conflict among the circuits.

III. CONCLUSION.

The EPA adopted a phased approach when it promulgated regulations under the Clean Air Act to deal with visibility impairment in Class I areas. The EPA acknowledged that the critical difference between Phase I and Phase II was "by what means a source can be identified." 45 Fed. Reg. 34762 at 34779 (Appendix, p. 16). Because the complex and unproven air quality monitoring techniques necessary to evaluate impairment which could not be visually attributed to a source had not yet been developed, the EPA limited its 1980 Phase I regulations to impairment traceable to a source by visual observation or other simple monitoring techniques. The adoption of Phase II regulations, authorizing the use of more complex techniques, was deferred.

However, in reaching its decision to impose emission controls on Navajo, the EPA based its attribution decision on the very analytical techniques that the EPA said required further study "according to standard Agency procedures" before they could be used for attribution determinations. The EPA's process for regulating Navajo violated the EPA's own regulations. Petitioner

therefore respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

By/s/Marvin S. Cohen
Marvin S. Cohen, Esq.*
Leslie A. McCarthy, Esq.
SACKS, TIERNEY & KASEN
2929 N. Central, 14th Floor
Phoenix, Arizona 85012-2742
Telephone: (602) 279-4900

Counsel of Record *